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SUBJECT: Need clearance: Vacancies Letter

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TO: Dorian V. Weaver (CN=Dorian V. Weaver/OU=WHO/O=EOP@EOP [WHO])
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TEXT:

This is the latest version of the Vacancies letter with a senior advisers veto recommendation to be signed by Erskine Bowles. WHLA plans to send the letter c.o.b. today. Please provide comments/clearance no later than 4pm today. Thank you.

Dear Senators Lott and Daschle:

I would like to take this opportunity to express the Administration's views on S. 2176, the Federal Vacancies Reform Act of 1998. The Administration cannot support this legislation in its present form. If the bill is not amended to address the Administration's concerns, the President's senior advisers would recommend that he veto the bill.

We believe that there are genuine differences of opinion about the applicability of the Vacancies Act, but some of the changes proposed in the legislation are acceptable. For example, we would agree to making it generally the exclusive governing statute. We believe that this change alone largely addresses the concerns raised most cogently by Senator Byrd.

Other aspects of this legislation, however, are extremely problematic. Let me articulate a few examples of what we see as very serious problems.

First, the legislation too narrowly limits who can serve in an "acting" capacity. Limiting the acting officer to "the first assistant" or another "PAS" appointee will only result in leaving many positions vacant, since many first assistant slots may also be vacant and because of the impracticality of one PAS performing the duties of another, in addition to or in lieu of (thus creating another vacancy) his own. Given the constrained time period of the Act, this provision is too narrowly drawn. This legislation could actually prohibit a President or agency head from appointing the most qualified person to the acting position. For example, if the most qualified and appropriate person to serve in an acting capacity is a career employee with vast experience at the agency, then this bill would prevent the career employee from acting in the position.

Second, this legislation could allow seriously harmful situations. After 150 days, the bill requires that the position in question be vacant, until a nomination is made. For a position involving critical duties pertaining to national security, criminal law enforcement, public health and safety, or stability of financial markets, such a vacancy could have perilous effects. The complicated procedures in the bill that absolutely disable particular positions from taking binding legal actions would have seriously disruptive effects on the functioning of the Government. Some workable safety valve should be provided so the smooth functioning and effective continuity of government is assured.

Third, experience teaches us that at the beginning of an administration, longer time periods than those provided for in the bill are needed to fill the positions of the government. Without this change, it could be extremely difficult for future administrations to get up and running.

Finally, let me make one additional and serious point. It is impossible to evaluate fully the merits of this legislation without considering the larger context of the nominations process. It is troubling that the Senate would so severely restrict the Administration's ability to fill vacant positions and do the people's business while at the same time confirming the President's nominees at an astonishingly meager pace. This President has made every effort to accommodate Senators who have strong views about particular positions and nominees, and, in addition, this President has used his constitutional authority to make recess appointments much less frequently than his predecessors. Nevertheless, a number of Senators have engaged in an unprecedented degree of politics in delaying even our most qualified and needed nominees. Nominations are routinely held "hostage" for reasons totally unrelated to a nominee's qualifications. In addition, undue delays are caused in the nominations vetting process when Senators sometimes late in the process voice opposition to a proposed nominee or support a previously unconsidered candidate. It is important that Senators consider this larger context in evaluating the merits of S. 2176.

We understand the genuine interest in passing legislation in this area and we would be willing to support a fair and workable bill. We cannot, however, support a bill that would have a severe and damaging impact on the ability of the government to do the people's business.

Respectfully,

Erskine Bowles

cc: Thompson, Glenn